

**BEFORE THE DIRECTOR OF THE
DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Stanislaus
(County File No. 50-0910-1329)

Administrative Docket No. 177

DECISION

**Foster Farms Dairy
529 Kansas Avenue
Modesto, California 95351**

Appellant /

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), county agricultural commissioners may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Stanislaus County Agricultural Commissioner found that the appellant, Foster Farms Dairy, violated 3 CCR section 6726(c) by failing to take its employee to a physician immediately after the employee experienced a pesticide exposure to his eye. The commissioner imposed a total penalty of \$700 for the violation.

Appellant appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction in the appeal under FAC section 12999.5.

Standard of Review

The Director decides the appeal on the record before the Hearing Officer. In reviewing the commissioner's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the commissioner's decision. If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the decision.

Factual Background

On March 25, 2009, at approximately 2:30 a.m., Mr. Conrado Nuñez, a milker employed by Appellant, notified his supervisor, Mr. Candido Amador, of a workplace injury. Mr. Nuñez was spraying a solution of Chemland Extract-2, registration number 4959-47-AA, bearing the signal word, "Danger," on a backsplash at the dairy. When Mr. Nunez put the one-gallon hand-pump sprayer to the ground, the trigger failed to shut off completely and the nozzle sprayed Mr. Nuñez into his mouth and right eye causing irritation and burning to the eye.

There is contradicting testimony and evidence regarding the subsequent events. Mr. Amador testified about these events consistent with his written account (Exhibit 6¹) prepared five months after the incident occurred and approximately two weeks after his employer was contacted by the County Inspector investigating the incident (Exhibit 3). Mr. Amador testified that after Mr. Nuñez told him of his workplace injury, he directed Mr. Nuñez to flush his eyes with the pint of eye flush nearby. He asked Mr. Nuñez if "he was alright and if he needed immediate medical attention. [Mr. Nuñez] responded that he was okay and he felt that he did not need to see a doctor" He then instructed Mr. Nuñez to wait in the office until he returned. Mr. Amador testified that he left the scene for approximately five minutes to secure the milking herd and that when he returned, Mr. Nuñez had left the worksite and appeared not to have used the eyewash station.

According to Mr. Nuñez, in the written incident report that he filled out the same day as the incident, the only action Mr. Amador took was directing him to the eyewash station that contained a pint of eyewash. It is also noted that Mr. Nuñez indicated on the incident report that his pain level, on a one to ten scale, ten being the worst, was an "eight." According to Mr. Nuñez, he used the eyewash station on the day of the incident, left the worksite one-half hour early and drove himself home to Merced, where he met his wife who then took him to Mercy Medical Center in Merced for treatment. The record shows that approximately one hour and twenty minutes lapsed between Mr. Nuñez's pesticide exposure and medical treatment.

3 CCR Section 6726(c)

3 CCR section 6726(c) provides in relevant part, "Emergency Medical Care. . . (c) When there is reasonable grounds to suspect that an employee has a pesticide illness, or when an exposure to a pesticide has occurred that might reasonably be expected to lead to an employee's illness, the employer shall ensure that the employee is taken to a physician immediately."

The Chemland Extract-2 label states in relevant part under the heading, "First Aid," "IF IN EYES: Hold eye open and rinse slowly and gently with water for 15-20 minutes. Remove contact lenses, if present, after first 5 minutes. Call a Poison Control Center or doctor for

¹ It is noted that the incident took place on March 25, 2009, and that Mr. Amador's memorandum introduced by Appellant was dated August 24, 2009.

treatment advice.” There is evidence in the record that the attending physician/physician’s assistant treated Mr. Nuñez with an antibiotic ointment and found “mild eyelid edema;” hence, there was injury to Mr. Nuñez’s eye. There is information in the record that Mr. Nuñez was not wearing the proper eye protection as required by the Chemland Extract-2 label.

Reasonable inferences from the hearing record are that Appellant did not ensure that the employee is taken to a physician immediately, a violation of 3 CCR section 6726(c), when in fact, Mr. Nuñez did sustain an eye injury from the pesticide exposure and sought medical attention on his own accord.

Conclusion

The record shows the commissioner's decision is supported by substantial evidence and there is no cause to reverse or modify the decision.

Disposition

The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the \$700 fine.

Judicial Review

Under FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION

Dated: 8 November 2010

By: Mary Ann Warmerdam
Mary Ann Warmerdam, Director